UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNIVERSAL CITY STUDIOS, INC. Plaintiff, vs. NINTENDO CO., LTD. and NINTENDO OF AMERICA, INC., Defendants.	82 Civ. 4259 (RWS) PLAINTIFF'S RESPONSES TO THE SECOND SET OF INTERROGATORIES BY DEFENDANT NINTENDO OF AMERICA, INC.

Plaintiff, Universal Studios, Inc. ("Universal") responds to defendant Nintendo of America, Inc.'s Second Set of Interrogatories as follows:

Interrogatory No. 1

Identify any federal or state trademarks or applications for such trademarks or copyrights in the name, character or story of "King Kong" of which Universal or its affiliates are aware, other than those sought by Universal, its affiliates or its licensees, and state any action Universal or its affiliates are taking or have taken with respect to any such applications, trademarks or copyrights.

Response to Interrogatory No. 1

Universal objects to "identifying" copyright applications in the story or character "King Kong" on the grounds that (a) none of Universal's claims in this lawsuit are

based on the Copyright Act and (b) whether or not there are any such applications is neither relevant to the issues in this case nor likely to lead to the discovery of evidence that would be relevant.* Insofar as the interrogatory seeks information with respect to federal and state trademark applications for "King Kong", Universal is aware of the following:

a. Trademark Registration No. 1,076,514 filed by Mego Corp. on December 3, 1975 for toy animal figures and play sets. When it applied for this trademark registration Mego Corp was a licensee of RKO General Inc. In July 1979 Mego assigned the registration to RKO and Universal is presently endeavoring to secure an assignment of the registration from RKO.

b. Trademark Registration No. 6118,277 filed on February 4, 1976, and registered on August 15, 1979 by H.H. Brown Shoe Co., Inc. for footwear. Universal understands that RKO General filed opposition proceedings to this application but subsequently withdrew those proceedings. However, Universal is not aware that H.H. Brown is currently using "King Kong" as a trademark for any of its products. Universal is aware that over the years others have applied to register "King Kong" as a trademark for various products and services but

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* It is not apparent to Universal that anyone could copyright the name "King Kong".

believes that other than the two applications listed above, all such registrations by third parties have since either been abandoned or allowed to expire without being renewed.

The only state trademark registration for "King Kong" of which Universal is aware is one secured by a window cleaning company in Kansas in 1980. Universal does not know whether that company ever actually used "King Kong" in its business and, if it did, whether it is continuing to do so today.

Universal's "awareness" of the foregoing trademark applications derives from search reports which Universal commissioned "Trademark Service Corp." to prepare in September 1981 and January 1982. Copies of both reports are included in Document Folder 1a.

Interrogatory No. 2

Identify each and every infringing use of the name, character or story of King Kong of which Universal or its affiliates are aware and state any action taken by Universal or its affiliates with respect to such infringements.

Response to Interrogatory No. 2

Other than defendants' infringement of "King Kong" as described in Universal's complaint in this lawsuit and the infringing activities of defendants' "Donkey Kong" licensees, Universal and its affiliates are not presently aware of any other infringements of "King Kong". Universal is aware,

however, that prior to the time that Universal acquired its trademark rights in the story, name and character "King Kong", action was taken with respect to certain infringements as follows:

a. In August 1976, RKO General Inc. filed suit against Key International Film Distributors in Federal District Court for the District of Colorado over the latter's attempt to advertise and distribute a motion picture called "The New King Kong". RKO secured a permanent injunction in the action and a copy of the injunction decree is included in Document Folder 1a.

b. In November 1976, Paramount Pictures Corp. and Dino De Laurentiis brought an action for unfair competition against Worldwide Entertainment Corp. over the latter's advertising for a motion picture entitled "Ape", which featured a poster on which a giant gorilla bearing a resemblence to "King Kong" was shown along with other elements which infringe the "King Kong" story, name and character. A copy of the reported decision in the action can be found at 195 U.S.P.Q. 539 (S.D.N.Y. 1977).

It is Universal's policy when it learns of activities by others which Universal regards as infringing its trademark rights in the "King Kong" story, name and character, to take steps appropriate under the circumstances (a) to put the infringing party on notice of Universal's rights and (b) if

efforts to persuade the infringing party to cease and desist are unsuccessful, to take legal action to enforce those rights. Consistent with this policy, Universal is advising defendants' "Donkey Kong" licensees that their use of "Donkey Kong" as a trademark for products and services is an infringement of Universal's trademark rights in "King Kong".

Interrogatory No. 3

Has Universal or its predecessors in interest ever permitted any third-party use of the name, character or story of "King Kong" (other than by licensees) to go unchallenged? If so, describe each such instance, the reason why the use was unchallenged, and identify and locate all documents relating thereto.

Response to Interrogatory No. 3

Universal is not in a position to give a response to this interrogatory insofar as it purports to cover third-party use of the "King Kong" name, character or story prior to the time Universal acquired its rights in these properties. It is Universal's understanding, however, that RKO did not permit unauthorized third-party use of "King Kong" as a trademark and did challenge unauthorized uses when it became aware of them. Evidence of RKO's policy in this respect is reflected in the lawsuit RKO brought against Key International Film Distributors mentioned in response to the previous interrogatory. Insofar as this interrogatory is addressed to Universal, the answer is

"no", Universal is in the process of "challenging" all unauthorized uses of "King Kong".

Interrogatory No. 4

Are any recordations of the story "King Kong" in the public domain. If so, state which recordations are in the public domain and whether Universal claims to have exclusive rights to the story as related in these recordations and the legal basis for such rights.

Response to Interrogatory No. 4

Universal is not aware of any judicial determination declaring the story "King Kong" to be in the public domain. Universal is obviously aware that a claim to that effect was made (by Universal) in Universal's 1975 lawsuit against RKO General Inc., but the claim was not resolved. Universal's present understanding is that neither the novel "King Kong" nor any of the "King Kong" motion pictures has been held to be in the public domain.

Interrogatory No. 5

Does Universal have any exclusive right to the use of the story of "King Kong" or elements thereof as recorded in the February and March 1932 issues of Mystery Magazine or the novel "King Kong" copyrighted in 1932 and published in 1932 by Grossett and Dunlap. If so, state which elements of said recordations as to which Universal claims an exclusive right

have previously been produced for defendants.

Interrogatory No. 8

Identify the specific rights, if any, that you concede any party, other than RKO General, Inc., Richard Cooper, or licensees have in the name, character or story of "King Kong" and state the source of any such rights.

Response to Interrogatory No. 8

There are no such rights.

Interrogatory No. 9

When do you contend that the name, character and story of "King Kong" achieved secondary meaning, and over what period(s) of time do you contend that the name, character and story has had secondary meaning.

Response to Interrogatory No. 9

Universal contends that the name "King Kong", the gorilla character "King Kong", and the elements of the "King Kong" story to which Universal refers in its complaint against defendants acquired "secondary meaning" with the public some time subsequent to RKO General's release of the motion picture "King Kong" in 1933 and prior to the release by Paramount in 1976 of the "King Kong" re-make produced by Dino De Laurentiis Corp. Universal maintains that the name, character and story "King Kong" has had a "secondary meaning" to the public from at least the late 1930's through the present day.

Interrogatory No. 10

Identify each and every similarity or common element that you contend exists between "King Kong" gorilla character and "Donkey Kong".

Response to Interrogatory No. 10

Apart from their names, the elements which make defendants' "Donkey Kong" gorilla similar to Universal's "King Kong" gorilla are obvious from the pictorial representations of the two gorilla characters. Defendants can make the comparison -- and judgment -- for themselves by reviewing (a) the "Donkey Kong" video arcade game and (b) comparing that game with (i) pictures taken from RKO's motion picture "King Kong" released in 1933 or Dino De Laurentiis' remake of that picture released in 1976 and (ii) advertising and promotional materials for those motion pictures.

Interrogatory No. 11

Identify each and every similarity or common element that you contend exists between the "gorilla atop a large building of girders" in Donkey Kong and "the visual image of King Kong atop a building."

Response to Interrogatory No. 11

The "elements" which make these two pictorial representations similar are obvious and can be determined by looking at the screen of defendants' "Donkey Kong" video arcade

game and comparing the visual image of defendants' "Donkey Kong" with the visual image of "King Kong" on top of a large building, as depicted, for example in the 1933 film classic "King Kong".

Interrogatory No. 12

Identify each and every element of the story "King Kong" which you claim is infringed by "Donkey Kong".

Response to Interrogatory No. 12

Universal claims that the graphic depiction on the screen of defendants' "Donkey Kong" video arcade game of the "Donkey Kong" gorilla standing at the top of a large building with a female heroine at his side is an "element" of the "King Kong" story made famous by both the 1933 RKO "King Kong" motion picture and the 1976 Dino De Laurentiis "King Kong" motion picture. This use by defendants of what might best be described as a thematic or episodic element of the "King Kong" story was intended to and does in fact bring to the mind of those playing defendants' "Donkey Kong" game the pictorial image of Universal's "King Kong" on top of a large building.

Interrogatory No. 13

Identify each and every use in commerce of a trade name, trademark or service mark of the name "Kong" (as distinguished from "King Kong") in which Universal claims an interest including the dates of such use and the product or